(15)

Supreme Court, U.S.
FILED
DEC 19 2002
OFFICE OF THE CLERK

No. 02-5664

In The

Supreme Court of the United States

DR. CHARLES THOMAS SELL, D.D.S.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI IN SUPPORT OF PETITIONER

DENISE D. LIEBERMAN
AMERICAN CIVIL LIBERTIES
UNION OF EASTERN MISSOURI
4557 Laclede Avenue
St. Louis, MO 63108
(314) 361-2111
Fax: (314) 361-3135

PETER A. JOY
(Counsel of Record)
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
St. Louis, MO 63130
(314) 935-6445
Fax: (314) 935-5356

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

25 pp

QUESTION PRESENTED

1. Whether the Court of Appeals erred in rejecting petitioner's argument that allowing the government to administer antipsychotic medication against his will solely to render him competent to stand trial for non-violent offenses would violate his rights under the First, Fifth, and Sixth Amendments?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. The Petitioner Has A Liberty Interest To Bodily Integrity, Protected By The First And Fifth Amendments Of The Constitution, That Prohibits The Government From Injecting Him With Antipsychotic Drugs Against His Will Solely To Render Him Competent To Stand Trial For Non-Violent Offenses	3
A. The Forcible Medication Of The Petitioner With Antipsychotic Drugs Infringes On His First Amendment Interests	6
B. The Forcible Medication Of The Petitioner Infringes Upon His Fifth Amendment Interests	9
II. The Court Below Failed To Weigh Properly Petitioner's Liberty Interest In Bodily Integrity Against The Government's Interest In Administering Antipsychotic Medications Against His Will Solely To Attempt To Render Him Competent To Stand Trial For Non-Violent Offenses	14
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
CASES	
Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)	6
Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985)	8, 18
Bell v. Wolfish, 441 U.S. 520 (1979)	10
Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990)	4, 5
Eisenstadt v. Baird, 405 U.S. 438 (1972)	4
Griswold v. Connecticut, 381 U.S. 479 (1965)	4
Jacobson v. Massachusetts, 197 U.S. 11 (1905)	5
Loving v. Virginia, 388 U.S. 1 (1967)	4
Olmstead v. United States, 277 U.S. 438 (1928)	7
Parham v. J.R., 442 U.S. 584 (1979)	5
Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)	3, 4
Prince v. Massachusetts, 321 U.S. 158 (1944)	4
Riggins v. Nevada, 504 U.S. 127 (1992)	*passim*
Roe v. Wade, 410 U.S. 113 (1973)	4
Stanley v. Georgia, 394 U.S. 557 (1969)	7, 8
Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891)	3
United States v. Brandon, 158 F.3d 947 (6th Cir. 1998)	8, 10, 13, 18, 19
United States v. Sell, 282 F.3d 560 (8th Cir. 2002)	*passim*
United States v. Weston, 255 F.3d 873 (D.C. Cir. 2001)	17, 18, 19

TABLE OF AUTHORITIES – Continued

Page

Vitek v. Jones, 445 U.S. 480 (1980)..... 5

Walen v. Roe, 429 U.S. 589 (1977) 4

Wallace v. Jaffree, 472 U.S. 38 (1985) 7

Washington v. Harper, 494 U.S. 210 (1990)....6, 10 11, 13, 14

Youngberg v. Romero, 457 U.S. 307 (1982)..... 5

OTHER

U.S. CONST. amend. I.....2, 6, 7, 8, 9

INTEREST OF AMICUS CURIAE[1]

The ACLU of Eastern Missouri is the local affiliate of the American Civil Liberties Union with 2,500 members and its principal place of business in St. Louis, Missouri. As part of its mission, the ACLU of Eastern Missouri has participated in numerous cases supporting individuals' First, Fifth, and Sixth Amendment interests, including our participation in this case below as *amicus curiae*.

SUMMARY OF THE ARGUMENT

The Petitioner, Dr. Charles T. Sell, challenges a pre-trial determination that the government has the power to inject him with potentially dangerous and medically inappropriate antipsychotic drugs against his will solely to render him competent to stand trial for non-violent offenses. At issue in this case is nothing less than whether an individual has the right to make medical decisions affecting his body and mind.

The right of each person to determine his or her medical treatment is one of the most valued liberties in a democratic society. The liberty interest to bodily integrity in medical decisions has long been recognized by common law and under the Constitution. This Court has recognized

[1] Pursuant to Rule 37.2(a), letters of consent from both parties have been filed with the Clerk. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici*, their members, or counsel made a monetary contribution to preparing or submitting this brief.

the important Constitutional protections of personal autonomy and bodily integrity in decisions relating to procreation, contraception, refusal or termination of medical treatment (including life-saving medical treatment), and a criminal defendant's right to refuse unwanted antipsychotic medication prior to and during trial.

In upholding the trial court's decision, a split panel of the Court of Appeals for the Eighth Circuit failed to consider Dr. Sell's First and Fifth Amendment interests to be free from the government's control of his thoughts, emotions, and ability to communicate with his lawyers. The court below also failed to weigh properly Dr. Sell's liberty interest in bodily integrity against the government's interest in injecting him with antipsychotic drugs against his will solely to attempt to render him competent to stand trial for non-violent offenses.

More particularly, in reaching its decision, the court below failed to follow the test developed in *Riggins v. Nevada*, 504 U.S. 127 (1992). *Riggins* established a three-part test the government must meet before it may override the liberty interest of a person awaiting trial to be free from forced medication: 1) the treatment with antipsychotic medication is "medically appropriate," 2) there are no "less intrusive alternatives," *and* 3) the antipsychotic medication is either "essential for the sake of . . . [the defendant's] own safety or the safety of others" or there are other "compelling" reasons justifying forced medication. *Riggins*, 504 U.S. at 135-136. Although acknowledging the *Riggins* test, the court below failed to consider less intrusive alternatives to achieve the government's interest. Moreover, it specifically found that Dr. Sell posed no danger to himself or others, and it did not identify compelling

reasons justifying the forced medication order issued by the trial court.

These conclusions fatally undermine the court's holding. On this record, the government has simply not met its burden of proving a sufficient interest for violating Dr. Sell's liberty interest to be free from psychotropic drugs. For these reasons, the court ordered forcible medication of Dr. Sell should be overturned.

ARGUMENT

I. The Petitioner Has A Liberty Interest To Bodily Integrity, Protected By The First And Fifth Amendments Of The Constitution, That Prohibits The Government From Injecting Him With Antipsychotic Drugs Against His Will Solely To Render Him Competent To Stand Trial For Non-Violent Offenses.

This Court has long recognized that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). In numerous cases over the years, this Court has repeatedly found that the Constitution protects individuals from government control of decisions affecting bodily integrity. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 849 (1992) ("It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as

bodily integrity.") (citations omitted). There are two interrelated components of the liberty interest to bodily integrity which strongly support a finding of constitutional protection to make medical decisions prohibiting the government from injecting Dr. Sell with potentially harmful antipsychotic drugs against his will solely to render him competent to stand trial for non-violent offenses.

The first component of the liberty interest in bodily integrity protects the individual's interest in decisional autonomy – the freedom to make decisions concerning his or her life free from significant government interference. *See Walen v. Roe*, 429 U.S. 589 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Prince v. Massachusetts*, 321 U.S. 158 (1944). In *Casey*, this Court explained: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." 505 U.S. at 851.

The second component of the liberty interest to bodily integrity is explicitly found in this Court's cases involving a person's right to make medical decisions. In *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990), this Court reasoned that the right to bodily integrity is embodied in the general requirement of informed consent for medical treatment, and that "[t]he logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is to refuse treatment." *Id.* at 269. This Court found that "a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Id.* at

278. The right to refuse medical treatment is grounded in the notion of liberty that is "inextricably entwined with our idea of physical freedom and self-determination." *Id.* at 287 (O'Connor, J., concurring).

Whenever medical treatment is imposed contrary to a person's consent, this Court has recognized an interference with the person's liberty interest that must be balanced against the government's interest in seeking to infringe upon the right to bodily integrity. *See, e.g.*, *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (finding that involuntarily psychiatric treatment and behavior modification of an alleged mentally unstable prisoner constitutes "deprivations of liberty that requires procedural protections"); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) ("It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment. . . ."); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905) (finding that the state's interest in public health and safety was sufficient to override the individual's liberty interest to resist vaccination); *Riggins*, 504 U.S. at 135-36 (establishing three-part test government must meet before it may override an individual's liberty interest to be free from forced medication).

The fact that Dr. Sell has been found not competent to stand trial does not establish that the government may deny his right to make medical decisions for himself. Indeed, Dr. Sell has not been adjudicated incompetent to make medical decisions on his own behalf. Although this Court has never squarely decided the extent of the constitutional protections for persons not considered competent, it has recognized that the mentally ill and persons not deemed competent still enjoy liberty interests of bodily integrity. *See, e.g.*, *Youngberg v. Romero*, 457 U.S. 307, 315-316 (1982)

(holding that a profoundly retarded person still has constitutionally protected interests in personal safety and freedom from bodily restraint). In considering the extent of the liberty interest to bodily integrity in the context of forcibly administering antipsychotic medication, this Court has recognized that a mentally ill convicted prisoner possesses "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs" and "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 221-222, 229 (1990). Thus, Dr. Sell's liberty interests provide him with protection against government forcibly injecting him with antipsychotic drugs.

A. The Forcible Medication Of The Petitioner With Antipsychotic Drugs Infringes On His First Amendment Interests.

The government's intention to inject Dr. Sell with antipsychotic drugs with the express aim of controlling his thought processes, emotions, and ability to concentrate and communicate with his lawyers intrudes on Dr. Sell's First Amendment rights. The First Amendment provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I. This Court has interpreted the "freedom of speech" clause to include rights deemed essential to free speech, such as the "freedom of the mind." *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-235 (1977) ("For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.").

Forced medication may permanently distort the thought process of pretrial detainees, depriving them of their liberty interests including the freedom from intrusion and control of the government into and over their minds.

This Court has recognized that freedom of thought is central to the First Amendment. *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985) (an "individual's freedom of conscience [is] the central liberty that unifies the various clauses of the First Amendment."). In *Stanley v. Georgia*, 394 U.S. 557 (1969), this Court found that individuals were entitled to First Amendment protection from intrusions into their minds:

> The makers of our Constitution . . . recognized the significance of man's spiritual nature, of his feelings and of his intellect. [They] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men."

Stanley, 394 U.S. at 565-566 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). While *Stanley* addressed a constitutional right to possess obscene material, this Court's decision in that case recognized a broader liberty interest to be free from government interference with the workings of one's mind. This Court observed: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley*, 394 U.S. at 565.

Several Circuit Courts have found this principle applicable to the forced medication of pre-trial defendants.

Although this Court has not directly considered the nature of the First Amendment freedom of the mind when the government seeks to alter a person's mind with antipsychotic drugs, some Circuit Courts have found that forced medication of pretrial detainees like Dr. Sell affects their ability to produce ideas in violation of their First Amendment right to freedom of speech. In *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985), a unanimous panel of the Tenth Circuit found that "[t]he First Amendment protects the communication of ideas, which itself implies protection of the capacity to produce ideas." *Id.* at 1393-1394. The court further found that "[a]ntipsychotic drugs have the capacity to severely and even permanently affect an individual's ability to think and communicate," and thus implicate rights protected by the First Amendment. *Id.* at 1394. Relying in part on this Court's First Amendment analysis that the government cannot have the power "to control men's minds," *Stanley*, 394 U.S. at 565, the court in *Greaves* concluded that a pretrial detainee "retains a liberty interest derived from Constitution in avoiding unwanted medication with [antipsychotic] drugs." 744 F.2d 1394.

More recently, a unanimous panel of the Sixth Circuit found that a pretrial detainee "has a First Amendment interest in avoiding forced medication, which may interfere with his ability to communicate ideas." *U.S. v. Brandon*, 158 F.3d 947, 953 (6th Cir. 1998) (citing *Greaves*, 744 F.2d at 1393). Similarly, Dr. Sell has argued that he has a First Amendment interest in avoiding forced medication that will affect his ability to think and communicate. This fundamental interest is not limited to those free of any mental illness. Rather the First Amendment protects the interest of all persons to avoid government interference

with their ability to produce and communicate their thoughts.

The intrusion sought by the government is extensive and reaches far beyond its short-term prosecutorial goals. The forced medication sought by the government could have a life-long impact on Dr. Sell's ability to think and communicate. It impacts far more than just the symptoms of his mental illness, altering the very essence of his identity. Even the court below acknowledged that antipsychotic drugs alter a person's "cognitive processes" and that the drugs "can have serious, even fatal, side effects," *U.S. v. Sell*, 282 F.3d 560, 563 n.4 (8th Cir. 2002). (quoting *Harper*, 494 U.S. at 229.) However, the court below did not seriously consider the protection of Dr. Sell's thought processes, emotions, and ability to communicate free from government control. The court below failed to discuss Dr. Sell's First Amendment interests to be free from government ordered antipsychotic drugs, or how forced medication would impact that interest. By failing to address Dr. Sell's First Amendment rights of freedom of thought, to control his own mental processes, and to communicate with his lawyer in a non-drugged induced state, the court below failed to weigh all of Dr. Sell's fundamental liberty interests against the interest of the government to bring him to trial. Thus, the decision below approving of the forced medication of Dr. Sell should be reversed for failing to weigh all of his liberty interests to bodily integrity.

B. The Forcible Medication Of The Petitioner Infringes Upon His Fifth Amendment Interests.

The court below failed to consider the nature and extent of Dr. Sell's Fifth Amendment interests to bodily

integrity as a pretrial detainee to be free from forced medication. This Court has recognized that forced medication implicates a defendant's Fifth Amendment liberty interest in being free from bodily intrusion: "The forcible injection of medication into a non-consenting person's body represents a substantial interference with that person's liberty." *Harper*, 494 U.S. at 229. Dr. Sell's liberty interest is heightened by the fact that he is a pretrial detainee who is presumed innocent and is entitled to "at least those constitutional rights that we have held are enjoyed by convicted prisoners." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). Moreover, while Dr. Sell has been found incompetent to stand trial, he has not been found incompetent to make his own medical decisions. His fundamental interest in making choices about his bodily integrity is not rendered meaningless because he is charged with a crime. In Dr. Sell's case, where the medications at issue have serious and sometimes irreversible side effects, the court below erred by failing to consider the full extent of Dr. Sell's interests and the risks posed by the drugs. *See Harper,* 494 U.S. at 229. ("While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects."); *Brandon,* 158 F.3d at 954 ("Although the various drugs might have beneficial results, the concomitant side effects might be severe and irreversible.").

The government seeks to forcibly inject Dr. Sell with powerful antipsychotic drugs that carry the potential for very harmful and long-term side effects, including the possibility of death. The court below found that one of the side effects of the antipsychotic drugs the government wants to inject into Dr. Sell is "neuroleptic malignant syndrome, which is rare but fatal." *Sell*, 282 F.3d at 569. In *Harper*, a concurring opinion notes that thirty percent of the

persons who develop neuroleptic malignant syndrome die. *Harper*, 494 U.S. at 240 (Stevens, J., concurring). The court below found that other harmful side effects included "tardive dyskinesia and/or dystonic reaction, which causes a person to have involuntary movements of various parts of the body." *Sell*, 282 F.3d at 569. In *Harper*, this Court observed that "10 to 25%" of persons taking antipsychotic medication develop tardive dyskinesia. *Harper*, 494 U.S. at 230. Yet, despite these potentially dangerous and unavoidable side effects, the court below affirmed the district court order to forcibly inject Dr. Sell with antipsychotic drugs "on the chance it will make him competent to stand trial." *Sell*, 282 F.3d. at 572 (Bye, J., dissenting). In reaching its decision, the court below did not discuss *why* the government's interest to bring Dr. Sell to trial for non-violent offenses justified violating his right to bodily integrity and the substantial risks of side effects. Rather, the court below simply denied that Dr. Sell has a constitutionally protected interest in making his own decision whether to accept or reject the administration of potentially dangerous drugs.

The court below also based its decision to approve forcible medication of Dr. Sell on very limited evidence that antipsychotic drugs are medically appropriate. There was evidence that antipsychotic drugs are not effective for persons with "delusional disorder," Dr. Sell's medical condition, and therefore not medically appropriate for Dr. Sell. *Id.* at 569-570. The government's witnesses could not say with any certainty that the antipsychotic drugs would be medically appropriate or effective in making Dr. Sell competent to stand trial. *Id.* One of the government's medical witnesses indicated that he had only treated two persons diagnosed with delusional disorder using antipsychotic drugs for the purpose of attempting to restore them

to competency, and the medication was successful on only one person. *Id.* at 569. The second government medical witness had treated four persons diagnosed with delusional disorder using antipsychotic drugs with the purpose of attempting to restore them to competency, and the medication was successful on three of them. *Id.* In considering this conflicting evidence, the court below summarily found that the government witnesses' very limited experience with only six persons, two of whom did not regain competency, was sufficient to outweigh Dr. Sell's interest in bodily integrity to be free from potentially harmful drugs. *Id.* 570. On such limited evidence, involuntary medication of Dr. Sell simply cannot be justified by the government's solely prosecutorial interests.

The court below failed to consider the less intrusive alternative of Dr. Sell remaining in custody until he becomes competent to stand trial. The dissent notes that Dr. Sell will not be set free, and instead could face civil commitment until he becomes competent to stand trial. *Id.* at 574 (Bye, J., dissenting); *see Riggins*, 504 U.S. at 145 (Kennedy, J., concurring) (stating that if the State cannot render a defendant competent without involuntary medication, then it can resort to civil commitment). Thus, the question is not so much *whether* Dr. Sell will come to trial, but *when*. The government has less restrictive tools at its disposal through the civil commitment process to address its interest as to Dr. Sell.

The court below misapplied this Court's decision in *Riggins* in evaluating Dr. Sell's Fifth Amendment interest because Dr. Sell is not a danger to himself or others. In *Riggins*, this Court stated that pretrial detainees have *at least* the same rights as prisoners, though it stated that the government may be able to show an "overriding

justification" sufficient to warrant involuntary medication at a trial or in a pretrial setting. *Riggins*, 504 U.S. at 135. Such a justification has never been found to exist as to a non-dangerous detainee charged with non-violent offenses. *Riggins* expressly considered the danger level of the prisoner, who was ultimately tried and convicted of murder and robbery, in balancing Riggins's interest against those of the government. "Taking account of the unique circumstances of penal confinement, however, we determined that due process allows a mentally ill inmate to be treated involuntarily with antipsychotic drugs *where there is a determination that 'the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest.'*" *Id.* at 135, *quoting Harper*, 494 U.S. at 227 (emphasis added). None of these factors are present here. The government admittedly has no safety interest and no evidence has been presented showing that the medication is in Sell's medical interest.

Riggins does not address whether pretrial detainees awaiting trial on non-violent offenses who have been found to be non-dangerous, such as Dr. Sell, have a greater liberty interest than pretrial detainees who are dangerous and awaiting trial for serious violent offenses. Indeed, the court expressly stated it would not deal with that issue. However, another Circuit has explicitly addressed this question within the parameters of the *Riggins* test. The Sixth Circuit Court concluded that the government's interest in prosecuting a non-dangerous defendant for non-violent crimes is never sufficient to overcome the defendant's liberty interests in avoiding involuntary medication. *Brandon*, 158 F. 3d at 958.

The court below failed to consider that Dr. Sell was not dangerous nor a convicted prisoner, and it therefore

unduly expanded the *Harper* and *Riggins* holdings to include non-dangerous pretrial detainees charged with non-violent offenses. Indeed, the panel's decision below affords a non-dangerous, unconvicted pre-trial detainee fewer due process rights than convicted prisoners, who must be deemed dangerous to justify forced medication. Such a conclusion is inconsistent with the holdings of this Court and with the fundamental liberty interests at stake. *Harper* and *Riggins* involved defendants charged with violent crimes of robbery or robbery and murder. *Harper*, 494 U.S. at 217 (convicted of robbery); *Riggins*, 504 U.S. at 130 (convicted of robbery and murder). Both decisions are limited to dangerous or incarcerated defendants and the lower court's decision unjustifiably expands those holdings. Thus, the decision of the court below impermissibly infringes on Dr. Sell's Fifth Amendment interests to bodily integrity.

II. The Court Below Failed To Weigh Properly Petitioner's Liberty Interest In Bodily Integrity Against The Government's Interest In Administering Antipsychotic Medications Against His Will Solely To Attempt To Render Him Competent To Stand Trial For Non-Violent Offenses.

Under the standard of review articulated in *Riggins*, 504 U.S. 127, this Court should overturn the court medication order in Dr. Sell's case. This Court's cases establish the constitutional principles that protect liberty interests of bodily integrity and an individual's right to refuse antipsychotic drugs, though there may be limited exceptions when the government can demonstrate a compelling reason to infringe upon those rights. In order to justify the

government overriding a defendant's liberty interest to be free from forced medication, this Court held that three conditions must be met: 1) treatment with antipsychotic medication must be "medically appropriate," 2) there are no "less intrusive alternatives," *and* 3) the antipsychotic medication is "essential for the sake of . . . [the defendant's] own safety or the safety of others" or there are "other compelling" reasons to justify forced medication. *Riggins*, 504 U.S. at 135-136. This Court overturned the court medication order in *Riggins* for inadequate factual findings, including both a lack of evidence that continued administration of the antipsychotic drug was required and because there was no "finding that safety considerations or other compelling concerns outweighed Riggins' interest in freedom from unwanted antipsychotic drugs." *Id.* at 136.

Though it purported to apply the three-part test in *Riggins*, the court below in fact misapplied each part of that test. First, there has been no showing on this record that the involuntary medication the state has proposed is "medically appropriate" within the *Riggins* test, 504 U.S. at 127-28, given Dr. Sell's condition.

Second, the court below failed to consider whether there are "less intrusive alternatives" to achieve the government's objective. As the dissent below pointed out, if the government is concerned that Dr. Sell will be "set free," it can seek to civilly commit him "until he becomes competent, or voluntarily agrees to take medication." *Id.* at 574 (Bye, J., dissenting) (citing *Riggins*, 504 U.S. at 146 (Kennedy, J., concurring)). If appropriate on these facts and under state law, civil commitment is consistent with both the incapacitation and deterrence features of any potential prison sentence should Dr. Sell be convicted at trial. His confinement awaiting trial both incapacitates

him and it deters him and others from engaging in conduct that may give rise to possible criminal prosecution. The decision of the court below is silent with respect to how society's interests would be furthered by forcible injection of medications that may not even achieve the government's purpose of bringing Dr. Sell to trial in the immediate future. Dr. Sell has been confined for over four years awaiting trial for non-violent offenses that the dissenting judge below estimates under United States Sentencing Guidelines would result in thirty-three to forty-four months of incarceration *if* he were found guilty. *Sell*, 282 F.3d at 573 (Bye, J., dissenting). In failing to address the possibility of civil commitment, the court below failed to consider less intrusive alternatives to forced injections of antipsychotic drugs that, at best, *may possibly* make Dr. Sell competent to stand trial.

Third, the court below failed to find that the antipsychotic drugs are "essential" for Dr. Sell's own safety or the safety of others, and it did not find other "compelling concerns" that outweigh Dr. Sell's interests to be free from forced medication. *See Riggins*, 504 U.S. at 135-136. The court below affirmed the trial court's decision that Dr. Sell does not pose a danger to himself or others. *Sell*, 282 F.3d at 565 ("the evidence does not support a finding that Sell posed a danger to himself or others at the Medical Center."). In addition, the court below did not offer any analysis to support its conclusion that the government's interest in bringing Dr. Sell to trial was "essential" or "paramount," let alone compelling. *Id*. at 568.

Riggins held that the government must prove "safety considerations or other compelling concerns" to outweigh "the defendant's liberty interest in freedom from unwanted antipsychotic drugs." 504 U.S. at 136-137. Rather than

adhering to this requirement, the majority below "perfunctorily concludes that the government's interest in prosecuting" Dr. Sell for non-violent crimes outweighs his "significant liberty interest in refusing antipsychotic medication." *Sell*, 282 F.3d at 572 (Bye, J., dissenting). The dissent below contends that the majority deemed the sixty-two counts of fraud and single count of money laundering facing Dr. Sell as "serious" because of their sheer number. *Id*. at 573 (Bye, J., dissenting).

The dissent below described the majority's lack of analysis into the government's interest, and the dissent demonstrates that the government did not meet its burden of proving a compelling interest to use antipsychotic drugs with the hope of bringing to trial a person, Dr. Sell, charged with non-violent crimes. *Id*. at 572-574 (J. Bye, dissenting). The dissent makes clear that, based on the lack of severity of the charges against Dr. Sell and the substantial liberty interests at stake, the government's interest in prosecuting Dr. Sell's alleged economic crimes is not compelling. *Id*.

In upholding the government's interest in bringing Dr. Sell to trial even if it means overriding his liberty interests to bodily integrity, the court below relied, in part, on *U.S. v. Weston*, 255 F.3d 873, 880 (D.C. Cir. 2001). But, unlike the decision of the court below, the *Weston* court did weigh at length the government's interest in bringing a person charged with violent crimes to trial, finding that the grave nature of Weston's alleged crimes (murder) rendered the government's interest "essential." *Weston*, 225 F.3d at 881. The *Weston* court acknowledged that in spite of cases describing the government's general interest in adjudicating crimes as significant, the government's interest is not absolute: "We need not decide under what circumstances

trying and punishing offenders is not 'essential.' The government's interest in finding, convicting, and punishing criminals reaches its zenith when the crime is the murder of federal police officers in a place crowded with bystanders where a branch of government conducts its business." *Id.* at 880. Thus, *Weston* deals with the narrow issue of the government's interest in adjudicating violent crimes that carry substantial punishments and should not be held to stand for the principle that the governmental interest in bringing *all* individuals to trial is compelling even when the charges against the individual involve less serious non-violent offenses. Indeed, other courts have doubted that the government's interest in forcibly medicating a defendant in order to prosecute him can ever be compelling for less serious offenses. *See Brandon*, 158 F.2d at 961 (interest in prosecuting defendant for sending threatening mail not sufficiently compelling to justify medication); *Greaves*, 744 F.2d at 1395 (questioning whether government's prosecutorial interests could ever be compelling enough when balanced against a defendant's right to be free from involuntary medication).

While the court below seemed to acknowledge a duty to analyze the nature of the government's interest in bringing persons charged with non-violent crimes to trial, it failed to satisfy this requirement. Rather, the majority concluded, without any analysis, that the "charges of fraud and the single charge of money-laundering are serious." *Sell*, 282 F.3d at 568. The majority opinion does acknowledge that "[n]ot all charges ... are sufficient to justify forcible medication of a defendant; rather the charges must be serious." *Id.* at 568 (citing *Brandon*, 158 F.3d at 961). Yet, the court below failed to explain *why* or *how* the charges facing Dr. Sell are serious, which is essential to

analyzing whether the government's interest in prosecuting these charges would be considered compelling.

Although the court below cited *Brandon*, 158 F.3d at 961, for the proposition that charges must be serious to justify forcible medication of a defendant, the majority opinion did not consider that Dr. Sell was only facing a likely sentence of thirty-three to forty-one months if convicted, which is much closer to the maximum potential sentence of five years' imprisonment in the *Brandon* case rather than life imprisonment or the death penalty in the *Weston* case. *Sell*, 282 F.3d at 573 (Bye, J., dissenting). In *Brandon*, the court held that "the risk of error and possible harm involved in deciding whether to forcibly medicate an incompetent, non-dangerous pretrial detainee are likewise so substantial as to require the government to prove its case by clear and convincing evidence." *Brandon*, 158 F.3d at 961. Rather than requiring "clear and convincing evidence" of the government's interest in bringing Dr. Sell to trial for non-violent offenses, the majority below simply assumed such an interest existed.

The government's own witnesses cannot predict with any certainty that even with psychotropic drugs Dr. Sell will become competent to stand trial, and there is no dispute that the available drugs are potentially harmful. *Sell*, 282 F.3d 570-571. Dr. Sell has not been proven guilty of any crime, he faces trial for non-violent offenses carrying likely potential incarceration for less time than he has already been confined, he is not a threat to himself or others, and the government has a less restrictive option of seeking to keep Dr. Sell institutionalized until and unless he becomes competent to stand trial. The government has

not met the test articulated in *Riggins*, and the involuntary medication order should be overturned.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Eighth Circuit and declare that the government may not involuntarily medicate the Petitioner, Dr. Sell, for the purpose of rendering him competent to stand trial.

Respectfully submitted,

DENISE D. LIEBERMAN
AMERICAN CIVIL LIBERTIES
UNION OF EASTERN MISSOURI
4557 Laclede Avenue
St. Louis, MO 63108
(314) 361-2111
Fax: (314) 361-3135

PETER A. JOY
(Counsel of Record)
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
St. Louis, MO 63130
(314) 935-6445
Fax: (314) 935-5356

DATED: December 19, 2002

32
1321